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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

323 U.S. # 4
BOA-CAP

No. 786

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING; GEORGE C. McRAE, Treasurer of Fremont County, Wyoming; and ERNEST H. HARTMAN, Assessor of Fremont County, Wyoming, PETITIONERS AND APPELLEES BELOW,

VS.

UNITED STATES OF AMERICA,
RESPONDENT AND APPELLANT BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LOUIS J. O'MARR, Attorney General of the State of Wyoming, Capitol Building, Cheyenne, Wyoming;
L. A. CROFTS, County and Prosecuting Attorney, Fremont County, Wyoming, Lander, Wyoming;
JOHN U. LOOMIS,
EDWARD T. LAZEAR,
Majestic Building, Cheyenne, Wyoming,
Counsel for Petitioners.

DECEMBER, 1944.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No.

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING; GEORGE C. McRAE, Treasurer of Fremont County, Wyoming; and ERNEST H. HARTMAN, Assessor of Fremont County, Wyoming, PETITIONERS AND APPELLEES BELOW,

vs.

UNITED STATES OF AMERICA,
RESPONDENT AND APPELLANT BELOW.

PETITION.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED.

The Shoshone Tribe of Indians recovered a judgment of over four million dollars against the United States. *United States v. Shoshone Tribe,* 304 U. S. 111. Congress made an appropriation to pay the judgment. Act of June 25, 1938, 52 Stat. 1114, 1156. Later Congress prescribed the

manner in which the judgment fund should be used. Act of July 27, 1939, 53 Stat. 1128. See pages 33-35, infra.)

Section 3 (a) of the latter act provides that not to exceed $1,000,000 of the judgment fund, or interest thereon, shall be available for expenditure upon the request of the tribe and with the approval of the Secretary of the Interior for the purchase of lands. Section 4 provides for the establishment of land use districts within the Indian reservation, and within adjacent lands formerly ceded to the United States by the Indians, for the purpose of consolidating Indian and privately owned lands within such districts for the more beneficial use of such lands by the Indians and non-Indians. Section 5 provides for the restoration to tribal ownership of various lands, including those purchased under the act, as the non-Indian lands within any such district are acquired; and provides that all such restorations shall be subject to valid existing rights and claims. The act contains no provision that the lands purchased shall be free from state taxation.

The lands here involved were purchased pursuant to the Act of 1939 (R. 1; 15, 16) with funds of the Shoshone Tribe. At the time of purchase all of such lands were privately owned taxable lands in Fremont County, Wyoming (R. 18; 20; 34). After the lands were thus purchased the County continued to tax them and some of the lands were sold for taxes (R. 6, 7, 15, 16; 34, 35).

The United States filed its complaint seeking to quiet title to such lands in the United States and to restrain the petitioners from continuing to tax them (R. 1).

The petitioners answered (R. 15, 21) alleging in part that title to the lands in question was taken in the name of the United States as Trustee for the Indians under a settled policy of the United States, determined in contemplation of the fact that the Indians are no longer a dying or vanishing race but on the contrary are increasing more rapidly than the white race, for the purpose of placing such Indians upon lands owned by the tribe where they may live in harmony with their own aims and ideals as an integral part of American life and upon the basis of a self-sustaining economy; that such policy has been repeatedly stated in the

annual reports of the Secretary of the Interior; and that the granting of the relief sought would deprive Fremont County of a substantial amount of annual tax revenue upon which it depends in carrying out its governmental functions (R. 19, 24, 25).

The United States filed a Motion for Summary Judgment on the Pleadings (R. 20).

The action was heard in the District Court upon the Petition, Answer, Amended Answer and Motion for Summary Judgment on the Pleadings under the theory, shared by all parties, that there were no controverted questions which were material to the decision of the principles which control the case (R. 33).

The District Court overruled and denied the motion for summary judgment and entered judgment dismissing the complaint, holding that the tax involved is not a forbidden tax upon a Federal instrumentality under the principle stated by this Court in *Shaw v. Oil Corporation,* 276 U. S. 575, since Congress has not provided that the lands should be free from state taxation (R. 26 to 35, inclusive).

The United States appealed to the Circuit Court of Appeals (R. 35). The Circuit Court of Appeals reversed the judgment of the District Court and ordered that the cause be remanded to the latter Court with directions to enter a judgment as prayed in the complaint, holding that the lands involved are lands of the United States itself which are immune from taxation (R. 39 to 44, inclusive).

STATEMENT AS TO JURISDICTION.

1. The date of the judgment to be reviewed is October 10, 1944.

2. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code, § 240(a) as amended, 28 U.S.C.A. § 347; Act of Feb. 13, 1925, c. 229, 43 Stat. 936; also Act of July 27, 1939, 53 Stat. 1128 (infra, 33-35).

3. This is an action filed in the District Court of the United States for the District of Wyoming by the United States seeking to quiet title in it as against the taxing authorities of Fremont County, Wyoming (the Petitioners

herein), with respect to lands purchased pursuant to the provisions of the Act of Congress of July 27, 1939, 53 Stat. 1128, title to such lands having been taken pursuant to such act in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians; and seeking also to restrain such taxing authorities from continuing to tax such lands (R. 1). The petitioners answered (R. 15, 21), and the United States moved for summary judgment on the pleadings. The District Court denied the motion and entered judgment dismissing the cause of action of the United States on the merits (R. 26-35), it being agreed by all parties that no controversial question of fact was involved. The United States appealed to the Circuit Court of Appeals for the Tenth Circuit (R. 35). The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause to the District Court with directions to enter judgment as prayed for in the Complaint of the United States (R. 39-44). The question directly involved is whether the lands purchased are free from state taxation as lands of the United States itself or as an instrumentality of a function of government of the United States.

4. The United States relies upon the authority of the Act of Congress of July 27, 1939, 53 Stat. 1128, known as the Shoshone Judgment Fund Act, to sustain its title to the lands involved and to sustain its claim that such lands are free from taxation. The validity of such statute is in that way involved, and the pertinent parts thereof are set out in the Appendix hereto at pages 33-35.

5. The following cases are believed to sustain the jurisdiction of this court: *Shaw v. Oil Corporation*, 276 U. S. 575, *Oklahoma Tax Commission v. United States*, 319 U. S. 598; *Irwin v. Wright*, 258 U. S. 219, 229; *United States v. Allegheny County*, 322 U. S. 174, 182; *Clallam County v. United States*, 263 U. S. 341, 344.

6. The grounds upon which it is contended that the questions involved are substantial are stated under the heading "Reasons Relied on for Allowance of the Writ," infra, pages 5-7, and in the parts of the Petition there referred to.

QUESTION PRESENTED.

The question presented is whether the purchase of privately owned, taxable lands of a state, for an Indian tribe, with funds of the tribe, precludes the further taxation of such lands by the state, where the Act of Congress authorizing the purchase does not provide that such lands shall be free from state taxation, and where title to such lands as provided by such Act is taken in the name of the United States in trust for the Indians pursuant to a settled policy of the United States, determined in contemplation of the fact that the Indians are no longer a dying or vanishing race but on the contrary are increasing more rapidly than the members of the white race, for the purpose of placing such Indians upon lands owned by the tribe where they may live in harmony with their own aims and ideals as an integral part of American life and upon a basis of a self-sustaining economy. The specifications of assigned errors intended to be urged, numbered 1 to 6 inclusive, appearing at pages 9-10, infra, are adopted by reference and made a part of this paragraph.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has decided an important question of Federal law which is in conflict with applicable decisions of this court; and the question decided is one which on the particular facts, has not been, and should be, decided by this Court. We have stated the general nature of this question under the summary statement of the matter involved. In amplification of that statement we call the court's attention to the following cases:

In *Shaw v. Oil Corporation*, 276 U. S. 575, this court held that taxable land purchased under authority of Congress for an Indian, with funds of the Indian, title being taken in the name of the Indian subject to restriction upon his power of alienation, remained taxable by the State where Congress had not provided for freedom from state taxation. Holding that not every act of Congress in relation to the welfare of the Indians would be held to be so intimately connected with a governmental function as to create a tax free instrumentality, in the absence of express declara-

tion of non-taxability by Congress, and recognizing the progressive policy designed to develop economic independence for the Indians, the court concluded that taxable lands purchased for an Indian with funds of the Indian should remain taxable where Congress had not expressly provided they should be free from state taxation.

In *Oklahoma Tax Commission v. United States*, 319 U. S. 598, the court recognized that equality of privilege and equality of obligation should be inseparable associates and referred to the trend of the court's decisions sweeping away many of the means of tax favoritism. The court stated, with reference to the taxation of Indian property, that restriction of alienation of such property is not the equivalent of a grant of Congressional immunity, and that if Congress intends to prevent a state from levying a general non-discriminatory tax (in that case an estate tax), applying alike to all its citizens, it should say so in plain words, because such a conclusion cannot rest on dubious inferences.

In the following cases among others: *Irwin v. Wright*, 258 U. S. 219, 229; *Exchange Trust Co. v. Drainage District*, 278 U. S. 421; *Witherspoon v. Duncan*, 71 U. S. 210; *New Brunswick v. United States*, 276 U. S. 547; *Clallam v. United States*, 263 U. S. 341; *United States v. Allegheny County*, 322 U. S. 174, 186 to 188; this court has held that immunity from taxation extends to property owned by the United States itself and not to property actually owned by others, even though legal title may be in the United States.

The case presented by this petition is one in which privately owned taxable lands of Fremont County, Wyoming, have been purchased for and at the request of the Indian tribe with funds of the Indians. The lands are the property of the Indian tribe, and the United States merely holds legal title as trustee. The holding of such legal title while a restriction upon alienation by the Indians does not in itself result in tax immunity. *Oklahoma Tax Commission v. United States*, 319 U. S. 598.

The decision of the Circuit Court of Appeals conflicts with applicable decisions of this Court, particularly with *Shaw v. Oil Corporation*, 276 U. S. 575, and *Oklahoma Tax Commission v. United States*, 319 U. S. 598, and such de-

cision, conflicting as it does with substantial taxing powers of Fremont County, Wyoming, constitutes the decision of an important question of Federal law which should be decided by this Court. The decision of the Circuit Court of Appeals is based upon a situation of fact not previously passed upon by this Court, that is one where lands are purchased for a group of Indians constituting an Indian tribe (rather than for an individual Indian) with their own funds, and title is taken in the name of the United States in trust for the tribe (rather than in the name of the Indian or the Indian tribe).

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding such Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Tenth Circuit had in the case numbered and entitled on its docket, No. 2932, United States of America, Appellant, vs. The Board of County Commissioners of the County of Fremont, Wyoming; George C. McRae, Treasurer of Fremont County, Wyoming; and Ernest H. Hartman, Assessor of Fremont County, Wyoming, Appellees, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals for the Tenth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated December 26th, 1944.

Louis J. O'Marr, Attorney General of the State of Wyoming, Capitol Building, Cheyenne, Wyoming;
L. A. Crofts, County and Prosecuting Attorney, Fremont County, Wyoming, Lander, Wyoming;
John U. Loomis,
Edward T. Lazear,
Majestic Building, Cheyenne, Wyoming,
Counsel for Petitioners.

BRIEF.

I.

Opinions of Courts Below.

The opinion in the District Court (R. 26-32) is reported in 53 F. Supp. 395. The opinion in the Circuit Court of Appeals (R. 39-44) is reported in 145 Fed. (2d) 329.

II.

Jurisdiction.

A statement of the grounds on which jurisdiction of this court is invoked has already been made in the foregoing Petition at pages 3-4, and the same is hereby adopted and made a part of this brief.

III.

Statement of the Case.

A statement of the case has already been made in the foregoing Petition at pages 1-3 and the same is hereby adopted and made a part of this brief.

IV.

Specification of Assigned Erors Intended to Be Urged.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in remanding the cause to the District Court with directions to enter judgment as prayed in the complaint.

3. The Circuit Court of Appeals erred in holding that the lands involved are not taxable by Fremont County, Wyoming.

4. The Circuit Court of Appeals erred in holding that the tax assessments and tax sales involved are invalid.

5. The Circuit Court of Appeals erred in holding that the lands involved constitute property of the United States itself and are therefore immune from state or county taxes.

6. The Circuit Court of Appeals erred in holding that the lands involved are immune from state and county taxation under the following provisions of the Constitution of the United States: Article 4, Section 3; Article 1, Section 8; and Article 6.

ARGUMENT.

Summary.

It is the contention of the Petitioners that the land involved is not property of the United States itself which is immune from state taxation, but, on the contrary, that such land is the taxable property of the Indians to which the United States as guardian holds mere legal title as trustee. Privately owned taxable land purchased with the funds of Indians is not such an instrumentality of that function of the United States in its guardianship of the Indians, as to imply the exemption of such lands from taxation where Congress has not expressly so provided, when the lands are purchased pursuant to a policy of developing the independence and self-sufficiency of the Indians, even though title is taken in the name of the United States in trust for the Indian tribe.

I.

The land here involved is not property of the United States which is immune from State taxation.

Only property of the United States itself is immune from local taxation. Property of others to which the United States merely holds legal title in trust is not so immune.

This Court has held that lands to which the United States holds legal title only, equitable title and real ownership being in others, is not immune from local taxation.

Irwin v. Wright, 258 U.S. 219, 229.
Exchange Trust Co. v. Drainage District, 278 U.S. 421.
Witherspoon v. Duncan, 71 U.S. 210.

In each of the three cases last cited this Court held that where equitable title had passed to entrymen holding final certificates under the land laws of the United States, entitling them to patents, the lands were taxable to such

equitable owners under the laws of the State, notwithstanding legal title still remained in the United States.

Conversely this Court has held that where equitable title and real ownership are in the United States, legal title being in others, the property involved is immune from State taxation.

New Brunswick v. United States, 276 U.S. 547.
Clallam County v. United States, 263 U.S. 341.

In each of the two cases last cited the legal title to the property sought to be taxed by the State was in a corporation, but the United States was the real and equitable owner of the property by virtue of ownership of all of the stock of the corporation. This Court held that such property was immune from taxation.

In the case at bar the land taxed is the property of the Indians, not the property of the United States. The land was purchased with funds of the Indians, at their request and approval, and with the clear intent that the lands should be and remain the property of the Indians. While it was at first contemplated that the Shoshone Tribe would advance $500,000 for the purchases and that the United States would match this with an equal amount, it was finally determined, at the insistence of the Director of the Budget, that the Shoshones would advance the entire amount of $1,000,000. To offset the interest which the Arapahoes would have in the lands purchased it was provided by Section 6 of the Shoshone Judgment Fund Act (Appendix pages 33-35), that the Shoshones should be reimbursed with interest at four per centum per annum for the amounts so advanced from joint funds to the credit of the Shoshones and Arapahoes or from future accruals to such fund, as and when said funds should accrue. In other words, the Shoshones have advanced the entire amount of the purchases in the first instance and may be reimbursed for the half interest of the Arapahoes from such joint funds of the two tribes as may exist or come into existence. The Shoshones will be reimbursed in no other way, and the United States has paid no part of the purchases. (Senate Report No. 746, 76th Congress, First Session; House Report No. 1112, same session. It is difficult to conceive how Congress could have made it clearer under the circumstances

that the lands involved are the property of the Indians, and that the United States holds only legal title as trustee for them. It is obvious as a matter of law that the United States acted as guardian. The statute authorizing the purchases (Shoshone Judgment Fund Act, Appendix pp. 33-35) shows that the funds of the Indians themselves are to be used for that purpose. With respect to title the Act provides merely that title shall be taken in the name of the United States in trust for the Indians. All that this indicates is a purchase of lands by a guardian with funds of the ward, and a taking of the title in the name of the guardian as trustee in order to restrict alienation. Clearly the real ownership is in the Indians and only bare legal title is in the United States.

The following cases cited by the Circuit Court of Appeals upon this point are not inconsistent with the foregoing principles under the facts involved in this case.

Van Brocklin v. Tennessee, 117 U.S. 151.
Lee v. Osceola Improvement District, 268 U.S. 643.
Mullen Benevolent Corporation v. United States, 290 U.S. 89.
United States v. Allegheny County, 322 U.S. 174.
Mayo v. United States, 319 U.S. 441.
United States v. Rickert, 188 U.S. 432.
McCurdy v. United States, 264 U.S. 484.
Wisconsin Railroad Co. v. Price County, 133 U.S. 496.

Wisconsin Railroad Co. v. Price County, supra, holds that where something remains to be done to entitle a patentee to receive a patent, legal and equitable title remains in the United States and the land is not subject to local taxation. This is the mere converse of the rule that where every such thing has been done and the patent should issue, the real ownership is in the patentee and the land is subject to local taxation.

Van Brocklin v. Tennessee, supra, merely states the general rule that property of the United States is exempt under the Constitution of the United States from state taxation. The lands there sought to be taxed had been purchased by the United States at tax sale pursuant to congressional au-

thority and it was held that while the lands were so owned by the United States they were not subject to state taxation. In that case this court recognized (p. 169) that lands to which the United States holds only legal title, equitable ownership being in others, are subject to state taxation.

In *Lee v. Osceola Improvement District,* supra, assessments were made against lands within a road improvement district and it was later found that some of the lands were owned by the United States. No attempt was made to collect the assessment until title passed from the United States. It was held that the state could not then impose such special taxes on account of benefits resulting from improvements made before the United States parted with its title. The case is decided with respect to property "owned" by the United States at the times referred to. No question was involved as to whether the United States had only legal title with actual ownership in others.

In *Mullen Benevolent Corporation v. United States,* supra, the basis for the decision was that assessments for special benefits are not collectible from, and may not be assessed against, lands purchased by the United States under the Reclamation Act of June 17, 1902 (c. 1093, 32 Stat. 388). It was not questioned but that these lands were the property of the United States itself.

In *United States v. Allegheny County,* supra, the property which was the basis of the tax sought to be collected was machinery which belonged to the United States itself and was leased by it to a contractor for the production of war materials. It was held that such property was not subject to local taxation.

In *Mayo v. United States,* supra, the tax was upon the privilege of distributing fertilizer in the State of Florida. The United States itself owned the fertilizer and was distributing it thru the Secretary of Agriculture under congressional authority. This Court said the proposed fees were like a tax upon the right to carry on the business of the post office or to sell United States bonds thru Federal officials, and held that the transaction was immune from state taxation.

In *United States v. Rickert,* supra, the property sought to be taxed was property of the United States itself, that is lands of the public domain which had been set aside for Indian use, or improvements thereon and personal property purchased with money of the United States and put into the hands of the Indians. Such lands had been allotted to individual Indians under the provisions of the General Allotment Act (Act of February 8, 1887, c. 119, 24 Stat. 388, as amended, U.S. Code, Tit. 25, §331 and following). Section 1 of that act provides that where any tribe of Indians has been located upon any reservation created for their use, the President may cause allotments thereof to be made to individual Indians thereon. Section 4 provides for the allotment of lands of the United States to Indians not residing on a reservation or for whose tribe no reservation has been provided. Section 5 provides that so-called patents should be issued in the names of the allottees to be held in trust by the United States for a period of twenty-five years when the United States would convey the allotted lands to the Indian allottees or their heirs unless the time should be extended by the President. The legal effect of this arrangement was described by this court in the opinion as follows (p. 436):

> "In other words the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee."

This court did not decide that case upon the theory that the property involved was immune property of the United States itself, but upon the theory that such property was an instrumentality of the United States in its governmental function as guardian of the Indians. In that connection the Court said (p. 437): "* * * These lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to several allottees * * *. These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have

not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887 (General Allotment Act) * * * is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race. * * *."

McCurdy v. United States, supra, was decided upon the theory of *United States v. Rickert* and the facts were similar except that in the McCurdy case the lands were purchased by the United States from another tribe for the benefit of the Indians and they were allotted under the provisions of the Osage Allotment Act. (Act of June 28, 1906, c. 3572, 34 Stat. 539). That Act provided that homestead allotments thereunder should be inalienable and non-taxable until otherwise provided by Congress, and that other or surplus allotments thereunder should be taxable after three years, or when a certificate of competency had been issued to the allottee under authority of the act, or in case of death of the allottee. The question was whether the lands involved had become taxable under the provisions of the act and it was held that they had not. This court said the suit was brought by the United States as guardian and trustee for the Indians.

That the foregoing allotment cases were decided upon the Federal instrumentality theory was recognized by this Court in *Shaw v. Oil Corporation*, 276 U.S. 575, 579, and in *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 603.

Hence neither *United States v. Rickert*, supra, nor *McCurdy v. United States*, supra, are authority for the proposition that lands title to which is held by the United States as guardian or trustee for Indians are immune from taxation as property of the United States itself, because those cases were decided upon the Federal Government instrumentality theory. Furthermore in both of those cases, as we have previously suggested, the property sought to be taxed was property of the United States itself in that it was either lands of the public domain, set aside for Indian use, or improve-

ments thereon, or property purchased by the United States itself for the Indians. Although the lands had been allotted they had not become the property of the Indian allottees, who had no immediate right to patents in fee, but only the right to possess and use the lands for a period of twenty-five years, while title and ownership in the meantime remained where it had been, that is, in the United States. In those cases the United States acted as a trustee only in the sense that it retained ownership subject to certain assumed fiduciary obligations to the Indian wards. The title and actual ownership existing in the United States had never terminated or been conveyed to the Indian allottees; while in the case at bar the actual ownership of the Indians established by their purchase of the lands remains in them and the United States has only a naked legal title as trustee. In those cases the lands were the property of the United States itself, that is part of the public domain, or property purchased by the United States with its own funds, which the Indians were permitted to use; while here the lands are privately owned lands purchased by the Indians with their own funds, the only interest of the United States being bare legal title as trustee.

Hence if *United States v. Rickert*, supra, and *McCurdy v. United States*, supra, are considered as decided under the rule that property of the United States itself is immune from state taxation, the conclusion must follow that the property here involved is not so immune, because it is not the property of the United States but is the property of the Indians.

Where a guardian's own lands are appropriated by the guardian to the beneficial use of the ward a large measure of retained ownership and control in the lands by the guardian may be implied, particularly where the guardian is the United States acting under its traditional policy toward the Indian wards, but where the guardian buys land for the ward with the ward's own funds and the guardian merely takes title in its own name as trustee for the ward it cannot be implied that the guardian intended to establish extensive rights of ownership in the property in itself, but merely that it intended to exercise its function of guardianship and to restrict alienation.

This brings us to consider whether the lands here involved are non-taxable as an exempt instrumentality of the Federal Government.

The taxable land here involved which was purchased with the funds of the Indians is not such an instrumentality of the United States in its function as guardian of the Indians as to exempt such land from local taxation where Congress has not expressly so provided.

This court has held that lands purchased with restricted funds of Indians from the privately owned taxable lands of a state are not so intimately connected with that function of the Government of the United States in its guardianship of the Indians as to exempt such lands from local taxation where Congress has not expressly so provided. *Shaw v. Oil Corporation*, 276 U.S. 575.

In the case last cited privately owned taxable lands of the State of Oklahoma were purchased for an Indian with his restricted funds. The congressional authority under which the lands were purchased did not provide that they should be free from local taxation. The lands were leased for oil and gas exploitation. The questions presented were whether the lands purchased were subject to local taxation or whether such a tax was forbidden as one upon a federal instrumentality. It was held that the lands were subject to local taxation under the circumstances of that case. This Court said:

> "What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514. The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting apart, by allotment or otherwise, tribal lands or the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental functions as clearly to require independence of all state

control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation.

* * * * *

"The early legislation affecting the Indians had as its immediate object the closest control of the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners.

* * * * *

"The act under which Tiger's allotted land was leased is entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes." * * * In this as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.

"In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though

> Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks.
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> "It cannot be assumed that Congress at a time when it was withdrawing allotted lands from their former exemption in order that Indian citizens might assume the just burdens of state taxation, intended to extend a tax exemption by implication. In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from state taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land."

The "tribal lands or the public domain" referred to by Chief Justice Stone in the paragraph first above quoted clearly are those involved in the allotment cases represented by *United States v. Rickert*, supra. As we have already pointed out (pp. 14-16, supra), such lands were characterized by the fact that they were part of the public domain and as such were the property of the United States itself. It was this fact, we submit, and not the fact that they may have been first set aside for tribal use before they were allotted to individual Indians, which led to the conclusion that there was such an intimate connection with the guardianship of the Indians as clearly to require independence of all state taxation.

Shaw v. Oil Corporation, supra, has been cited with apparent approval in the following subsequent decisions of this court: *Superintendent v. Commissioner*, 295 U.S. 418, 421; *Board of Commissioners v. Seber*, 318 U.S. 705, 717; *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 611.

The doctrine of *Shaw v. Oil Corporation*, supra, applies to the case here presented. Here as there privately owned taxable lands were purchased with funds of the Indians, and in each case under congressional authority which did not provide that such lands should be non-taxable. The Indian policy which was involved in *Shaw v. Oil Corporation*, supra, was one designed to emancipate and foster the independence of the Indians under a system of individual allotments held

under restriction for a period of years and resulting eventually in conveyance by patent to the individual allottees. The Indian policy which is involved in this case is one designed to develop the economic self-sufficiency of the Indians by placing them upon lands owned by the tribe where they may live as an integral part of American life. In other words the same policy of developing the independence and self-sufficiency of the Indians has merely been translated from an individual to a tribal basis; and tax exemption by implication is equally inconsistent in either instance.

Judge Kennedy in his opinion in the District Court (R. 29-31) put the matter as follows:

> "In that case *(Shaw v. Oil Corporation)* the first question concerned the power of the Secretary of the Interior to exempt from taxation for an individual Indian, land or the income therefrom, purchased with restricted funds. In this case the purchase of lands was with Indian funds for the benefit of the entire tribe and the United States is attempting to secure exemption from taxation which is the legal equivalent to such action by the Secretary of the Interior. In each case the right to exempt from taxation in the absence of Statutory declaration is involved. We can see no logical distinction in legal principle whether the lands so purchased were for the benefit of an individual Indian or for a tribe of Indians.
>
> "The second question, answered in the negative by the Supreme Court, decreeing that the tax is not a forbidden tax upon a Federal instrumentality, is identical in principle in the cited case and the case at Bar. The Supreme Court held that the Secretary of the Interior, absent the direction of Congress, could not exempt the Indian lands or the proceeds therefrom from taxation and here the United States is attempting, without the authority of Congress, to secure the exemption of these lands from taxation.
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> "It would seem that Congress is gradually attempting a policy of broadening the scheme of rehabilitating the Indian by adding responsibility to his

role as a ward. The High Court itself is cognizant of the desirability of such a program. This is illustrated by the language of Chief Justice Stone in the Shaw case, supra, in the language found on page 580:

* * * * *

"Any plan of rehabilitation for the Indian to be a success must gradually eliminate the matter of treating the Indian as a ward to the extent that he is guarded as a small child by a parent. His successful future as a citizen of the country entitled to exercise the right of franchise can only be brought into fruition by requiring that he assume some responsibility of citizenship, if he is to have all of its privileges."

The Shoshone Judgment Fund Act (pp. 33-35, infra) itself clearly shows the intention to place a large measure of responsibility on the Indians and to encourage their self-sufficiency. Section 3(a) provides that $1,000,000 shall be available for purchase of such lands as are here involved "upon the request of the tribe and with the approval of the Secretary." Section 4 provides that "in all transactions involving tribal Indian land the consent of the Shoshone and Arapahoe Tribes shall first be obtained." Section 6 provides that all purchases of lands of the character here involved shall receive the approval of the Shoshone and Arapahe Tribal Councils or of the business committee thereof.

It is inconsistent with the purpose of a policy designed to result in Indian self-sufficiency and to enable them to live as an integral part of American life, for those responsible for the administration of Indian affairs to seek tax exemption for the taxable lands here purchased by the Indians in the absence of any provision by Congress that the lands should be tax exempt. As we have indicated Congress acted in authorizing the purchases as the guardian of the Indians. It had the discretion and power to determine whether it was for the best interest of its wards to declare these lands exempt. It cannot be implied from its failure to do so that it intended that lands taxable when purchased should thereafter become exempt. A ward is not exempted from taxation by the nature of his status, and the guardianship of the United States over Indians does not in itself result in tax

exemption in their favor. *Oklahoma Tax Commission v. United States*, infra, pages 25, 26; *Superintendent v. Commissioner*, infra, 26, 27.

Implied tax exemption is inconsistent with the fact that these Indians are not impoverished. They possess an enormous tract of the finest lands in Wyoming. It has been judicially declared that: "The reservation comprises the choicest and best watered portion of the State of Wyoming." *Shoshone Indians v. United States*, 85 Ct. Cl. 331, 341. The Shoshones have recently acquired a judgment fund of over $4,000,000 (*United States v. Shoshone Tribe*, 304 U.S. 111) which has enabled them to buy at least $1,000,000 in value of additional lands of a similar character. (Shoshone Judgment Fund Act, infra, pages 33-35). There is nothing to indicate that the Indians are not amply able to pay the taxes involved. Every implication is to the contrary. Clearly the taxes would have been paid, and none of the lands would have been sold for taxes, if those in charge of Indian affairs for the United States had not taken the position which resulted in non-payment and eventually in the bringing of this action.

An implication of tax exemption where Congress has not so provided, is also inconsistent with previous enactments of Congress. In the following instances Congress has provided for the purchase or other acquisition of taxable lands for Indian tribes, title to be taken in the name of the United States in trust for the tribes, and has provided in each instance that such lands shall be exempt from local taxation: Act of June 18, 1934, c. 576, § 5, 48 Stat. 985, U.S. Code Tit. 25 § 465; Act of Feb. 24, 1942, c. 113, § 1, 56 Stat. 121, U.S. Code Tit. 25 § 465 (a); Act of June 26, 1936, c. 831, § 1, 49 Stat. 1967, U. S. Code Tit. 25 § 501.

As previously pointed out an implication of tax exemption is likewise inconsistent with the policy of developing the self-sufficiency of the Indians so that they can live as an integral part of American life. If the Indians are to live as a part of the whole citizenry on the basis of self-sufficiency they must pay taxes on taxable land as do other citizens.

The statute authorizing the purchase of the lands here involved provided that restorations to tribal ownership of

lands therein referred to, which included the restoration of lands so purchased, should be subject to "valid existing rights and claims." This is inconsistent with the claim here made that the taxable lands purchased should not be exempt from the taxing right of the county and state.

The developing attitude of the United States toward its Indian wards from one of complete protection, as a matter of necessity, to that of encouragement of independence or self-sufficiency was noted by Chief Justice Stone in *Shaw v. Oil Corporation*, supra. It is not disputed here that the lands involved were purchased pursuant to a policy of encouraging the self-sufficiency of the Indians living on lands of the tribe as an integral part of American life, nor that the Indians are no longer a weak and vanishing race but that they are increasing more rapidly than is the white race.

There is no word or syllable in the legislative history of the Shoshone Judgment Fund Act to indicate that tax exemption of the lands involved was ever suggested or considered. This strongly indicates that such exemption was not intended. (Senate Report No. 746, 76th Congress, First Session; House Report No. 1112, same Session.)

This court has recently held that tax exemptions will not be implied in favor of Indians, and that if Congress intends such an exemption it must say so explicitly. *Oklahoma Tax Commission v. United States*, 319 U.S. 598.

In the case last cited the United States sought to recover inheritance taxes collected by the State of Oklahoma on property of Indians. The property consisted of the following: Land exempt from direct taxation; land not so exempt; restricted cash and securities held for the Indians by the Secretary of the Interior; and miscellaneous properties and insurance.

The Court in holding that all of the property involved was taxable except the lands expressly exempt from direct taxation by Act of Congress, stated the following propositions:

Tax exemptions are not granted by implication.

The tax immunity of Indian property formerly said to

rest on constitutional implication cannot now be resurrected in the form of statutory implication. (This clearly refers to the lack of express constitutional power over Indians, and means that implication will not be piled on implication. The only express provision in the Constitution of the United States granting Congress power with respect to Indians appears in Article 1, Section 8 of the Constitution, and provides as follows: "The Congress shall have power * * * to regulate commerce with * * * the Indian Tribes * * *." Otherwise the power has been implied as a matter of necessity. See: *The Kansas Indians*, 72 U.S. 737; *United States v. Kagama*, 118 U.S. 375; *United States v. Sandoval*, 231 U.S. 28.)

Tax exemption in favor of Indian property will not be implied upon the assumption that Congress intended such exemption in view of the existing legal framework.

Congressional restriction of Indian property is not alone sufficient to imply tax exemption.

Application of the normal rule against tax exemption by statutory implication prevents the reading of such an implication into the Act of Congress affecting Indian property.

A ward is not exempted from taxation by the nature of his status, and the guardianship of the United States over Indians does not in itself result in tax exemption in their favor.

The recent trend of decisions of the court doing away with means of tax favoritism should be followed.

In reaching these conclusions the Court said in part:

> "The respondent's second and major contention is that the State may not impose an estate tax upon the transfer of the restricted cash and securities because Congress by placing restrictions upon this property manifested a purpose to exempt it from Oklahoma estate taxes. Restricted property of an Indian is that which may not be freely alienated or used by the Indian without the approval of the Secretary of the Interior. We find, upon an examination of both the cases dealing generally with the taxation of Indian property and the statute which imposes the

restriction, that the restriction, without more, is not the equivalent of a congressional grant of estate tax immunity for the cash and securities.

"The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the Government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. * * * For a period of time, Indian lands held in trust by the United States were found to be constitutionally tax-exempt on the theory that they were federal instrumentalities, i. e., that the lands were held by the United States for the Indians, and were therefore non-taxable. United States v. Rickert, 188 U. S. 432.

* * * * *

"The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.

* * * * *

"We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

* * * * *

"This Court has repeatedly said that tax exemptions are not granted by implication. * * * If congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. 'Nontaxability and restriction upon alienation are distinct things,' *Superintendent v. Commissioner,* supra, 421, and when Congress wants to require both nonalienability and nontaxability it can, as it has so often done, say so explicitly.

"It is true that our interpretation of the 1933 statute must be in accord with the generous and pro-

tective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. * * *.

"Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. * * * The trend of these cases should not now be reversed."

The taking of title in this case in the name of the United States as trustee for the Indians was in effect only a restriction upon alienation and does not result in tax exemption.

The statute (pages 33-35, infra) provides merely that title shall be taken in the name of the United States in trust for the Indians. This necessarily results in a restriction upon alienation. There is nothing in the statute to indicate that more was intended.

Restriction upon alienation does not result in tax exemption.

Superintendent v. Commissioner, 295 U. S. 418.
Oklahoma Tax Commission v. United States, 319 U. S. 598.
Shaw v. Oil Corporation, 276 U. S. 575.
United States v. Hester (C.C.A. 10), 137 Fed. (2d) 145.
United States v. Brown, 8 Fed. (2d) 564, 567.

In *Superintendent v. Commissioner,* supra, this Court said at page 421:

"Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent

> with that relationship that exemption is a necessary implication. *Non-taxability and restriction upon alienation are distinct things.* Choate v. Trapp, 224 U. S. 665, 673. The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden." (Italics added.)

In *Oklahoma Tax Commission v. United States,* supra, at page 607 this Court quoting with approval some of the above language from Superintendent v. Commissioner, said:

> " 'Non-taxability and restrictions upon alienation are distinct things,' and when Congress wants to require both non-alienability and non-taxability *it can, as it has so often* done, say so explicitly." (Italics added.)

See further quotations from that case at pages 24-26 of this brief, particularly the language to the effect that tax exemption will not be implied from the existing legal framework. See the language quoted from *Shaw v. Oil Corporation,* supra, at page 19 of this brief. The other cases cited are to the same effect.

We submit that in the absence of any indication by Congress that more was intended, it must be assumed that the taking of title in the name of the United States in trust for the Indians was intended only to create a restriction upon alienation and that tax exemption does not result.

The doctrine of *Shaw v. Oil Corporation,* supra, in the light of *Oklahoma Tax Commission v. United States,* supra, we submit, is that taxable lands purchased with the funds of Indians under the authority of the Unted States as their guardian, pursuant to a policy designed to encourage the self-sufficiency of the Indians, and to permit them to live as an integral part of American life, are not exempt from local taxation unless Congress in the exercise of its discretion as such guardian determines the wisdom of such tax exemption and so provides. This is so because in such a case the Government function involved, that is the guardianship of the Indians, rests upon constitutional implication and there is not such an intimate connection between such purchases and the performance of such function as clearly

to require tax exemption in the absence of provision therefor. This doctrine is based not only upon logic but upon the soundest reasons of public policy, because it involves the power of Congress to deprive a state of vital tax revenue. The determination of whether such power has been exercised or was intended should not be permitted to rest upon implication, particularly when the exercise of the power involves in turn the exercise of the guardian's discretion as to whether the power should be invoked in the particular case. It is only in the clearest kind of case that such an implication of tax exemption may be permitted. Congress has the power to provide for tax exemption. When it finds it advisable to exercise the power it is not too much to require that it say so in plain words as this Court has said in *Oklahoma Tax Commission v. United States,* supra. The fact that the guardian sees fit to take title in its own name as trustee for the ward and that the ownership of the lands purchased is to be preserved in the tribe, does not, we submit, show an intention to establish tax exemption with such clarity as to justify such exemption by implication. The taking of title in the name of the United States as trustee merely indicates, as we have said, an exercise of the function of guardianship and an intention to restrict alienation; while the preservation of ownership in the tribe indicates only a purpose to comply with the existing Indian policy. Tax exemption may not be implied from the fact of tribal ownership. Such fact must be considered in its proper setting to determine its effect in that regard. And the fact that tribally owned lands, derived from the nontaxable lands of the United States, were held, at an earlier period of Indian development, and under other circumstances, to result in freedom from state taxation *(United States v. Rickert,* supra), has little if any bearing upon whether freedom from taxation will be implied here, where the lands were purchased from the taxable lands of the state with the funds of the Indians themselves, and were placed in tribal ownership under a policy of developing Indian self-sufficiency on a tribal basis in order to permit the Indians to live as an integral part of American life.

Since the lands here involved are not immune or exempt from taxation either upon the ground that they constitute property of the United States itself, or that they con-

stitute a tax exempt instrumentality of the United States in its guardianship of the Indians, it follows that the basic provisions of the Constitution of the United States relied on by the Circuit Court of Appeals are not applicable, that is: Article 4, Section 3; Article 1, Section 8; and Article 6.

The lands here involved were privately owned taxable lands when purchased by the Indians. The fact that they may at one time have been a part of the Indian reservation, as suggested by our opponents in the Circuit Court of Appeals, does not alter this fact. The Indians had ceded the lands involved to the United States for the very purpose of selling them to private owners and had thereby relinquished all their rights (Act of March 3, 1905, 33 Stat. 1016).

Nor is it material whether the lands involved are restored to the Indian reservation. There is no provision in the Shoshone Judgment Fund Act that any lands should be restored to any reservation but only that restoration shall be made to tribal ownership. The purpose is made clear, we submit, by the language of the Act itself which provides in Section 5 that lands shall be restored to tribal ownership as non-Indian lands are acquired within a given land use district, and by Section 4 where it is provided that consolidation of Indian and privately owned lands within such districts shall be affected to the end that Indian and non-Indian holdings may be consolidated for more beneficial use. In other words a regrouping for more beneficial use is all that is involved. All of this is a part of the policy that the Indians should be placed upon lands owned by the tribe where they may live as an integral part of American life on the basis of a self-sustaining economy. Nor is such a regrouping inconsistent with the fact and intention that taxable lands purchased by a tribe and owned by it should remain taxable and at the same time that other tribal lands, that is lands owned by the United States and set aside by it as a reservation for the use of the tribe, should remain non-taxable.

The respondent urges in effect that the lands here involved should be freed of local taxation by implication because of the existing legal framework, that is the legal

framework under which lands derived from the United States are held by Indians under different circumstances, as in *United States v. Rickert,* supra, (sometimes referred to as held in trust), and lands which are held as tribal lands under different circumstances, that is reservation lands owned by the United States which it permits the Indians to use. But this Court has clearly said in *Oklahoma Tax Commission v. United States,* supra, that such tax exemption will not be implied by reason of the existing legal framework.

The claimed distinction which respondent has heretofore urged between tax immunity and tax exemption has no substantial basis. If the lands here could be held to be property of the United States itself, they would, of course, be constitutionally immune. Otherwise the suggested distinction becomes only a play on words. This Court has frequently used the terms with apparent interchangeability. The real question is whether the lands here involved will be held free from local taxation where Congress has not so provided, and we submit that in determining this question under the authorities any such suggested distinction becomes unimportant.

The termination of the right of the petitioners to tax the lands here involved can only be sustained by implication. This Court has said in *Oklahoma Tax Commission v. United States,* supra, that this will not be permitted; and in *Goudy v. Meath,* 203 U. S. 146, 149, the Court said with respect to an Indian, that "the rule of exemption for him must be the same as for other citizens—that is, that no exemption exists by implication but must be clearly manifested."

We submit that the controlling considerations which determine the continuing taxability of the lands here involved are, (1) that such lands were purchased with the funds of the Indians themselves; (2) that they were taxable lands of Fremont County, Wyoming, when purchased; and (3) that Congress could have, but did not see fit to terminate the right of the local authorities to tax them.

CONCLUSION.

The Indians are no longer a weak and vanishing race. They are ready for economic self-sufficiency as an integral part of American life. These Indians occupy some of the finest lands of the State of Wyoming and are well-to-do. They enjoy all the privileges of citizenship including the right to vote with consequent political power. They enjoy the privileges of the public schools of the State and may avail themselves of them to the extent they choose. The public welfare of the State is available to them. They enjoy the privileges of the courts of the State, both civil and criminal. And finally, they enjoy the privilege of serving with their fellow citizens in the armed forces, where they are distinguishing themselves for aptitude and valor. These citizens do not require such a discriminatory preference as would result from permanent tax immunity of the fine Wyoming lands purchased by them. Congress has clearly recognized this fact in the legislation here involved.

The writ of certiorari should be granted, and upon further hearing the judgment of the Circuit Court of Appeals should be reversed and the case remanded with directions to affirm the judgment of the District Court.

Respectfully submitted,

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